BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement Of Certain of the Commission's Cost Assignment Rules	)	WC Docket No. 07-21
	)	
	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules	)	WC Docket No. 05-342

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

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* Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

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REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Time Warner Telecom Inc. ("TWTC"), One Communications Corp. ("One"), COMPTEL, and Sprint Nextel Corporation hereby file this reply to oppositions[1] to the petition for reconsideration[2] of the AT&T Cost Accounting Order[3] filed in the above referenced dockets. All of the Opponents claim that the *Petition* merely restates arguments already made in the underlying proceeding. *See AT&T Opp.* at 2; *Verizon Opp.* at 2; *USTA Opp.* at 2. This is untrue. In fact, the discussion in the *Petition* demonstrates that the FCC either failed to address

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[1] *See* Opposition of AT&T Inc. to Petition for Reconsideration, WC Dkt. Nos. 07-21 & 05-342 (filed June 11, 2008) ("*AT&T Opp.*); Opposition of Verizon to Petition for Reconsideration, WC Dkt. Nos. 07-21 & 05-342 (filed June 11, 2008) ("*Verizon Opp.*"); United States Telecom Association's Opposition Petition for Reconsideration, WC Dkt. Nos. 07-21 & 05-342 (filed June 11, 2008) ("*USTA Opp.*") (AT&T, Verizon and USTA are referred to herein collectively as "the Opponents").

[2] *See* Petition for Reconsideration of Sprint Nextel Corp. *et al.*, WC Dkt. Nos. 07-21 *et al.* (filed May 27, 2008) ("*Petition*").

[3] *See Petition of AT&T For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules et al.*, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) ("*Forbearance Order*").

Petitioners' arguments in a reasonable fashion or failed to address them at all. Moreover, none of the Opponents' other arguments has merit.

1. The Opponents Of The Reconsideration Petition Mischaracterize Petitioners' Key Arguments Regarding Use Of Accounting Data.

The Opponents allege that Petitioners argue that elimination of cost accounting requirements will harm the public interest by precluding the FCC from lowering price cap levels to achieve a particular rate of return. *See AT&T Opp.* at 9; *Verizon Opp* at. 7. In response to this alleged argument, AT&T cites numerous orders that it claims supports its assertion that the FCC has never used accounting data to set price cap rates in accordance with an accounting rate of return.[4] There is no merit to the Opponents' argument.

Contrary to the Opponents' allegations, Petitioners did *not* argue that the FCC should use data yielded by the Cost Assignment rules to set ILEC rates based on a specified rate of return. Rather, the Petitioners asserted that the elimination of the accounting rules eliminates the very tools necessary to *monitor* whether RBOCs are earning monopoly returns for their access services and whether further investigation into rate levels is needed. *Petition* at 6. As Verizon put it, the Petitioners argued that accounting data can be used to determine if price regulation is "malfunctioning." *Verizon Opp.* at 3 (internal cites omitted). The FCC's actions in the *CALLS Order* demonstrate that accounting rates of return monitored on an ongoing basis can serve as the proverbial "canary in the coal mine," alerting regulators to supracompetitive prices and justifying targeted price reductions that are established in follow-on proceedings. *See Petition* at 7-8. The

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[4] In refuting Petitioner's "argument," AT&T cites to many past orders, all of which stand for the general proposition that the FCC generally does not rely on accounting data to lower RBOC prices "to any specified rate of return." *See AT&T Opp.* at 6 & n.3 (citing *Access Charge Reform Order*, 12 FCC Rcd 15982 ¶ 292 (1997)); *see also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 546 (8th Cir. 1998) (where the court upheld the FCC's decision not to use accounting data to "lower interstate access charges to *equal economic cost*") (emphasis added).

FCC made this very distinction between the use of accounting data for monitoring as opposed to direct rate making in its first Price Cap Order.[5] AT&T completely glosses over this distinction in its repeated cites to paragraph 380 of that order.

The Opponents try to dismiss the FCC's use of ARMIS and accounting data in the *CALLS Order* based on the assertion that "actual rates and price caps in the CALLS Plan were established through an industry-wide negotiation and settlement process." *AT&T Opp.* at 8; *see also Verizon Opp.* at 4-5. But there can be no denying that the FCC used the cost assignment data as a check to determine if price cap recalibration was required. Moreover, the fact that the specific CALLS Plan was the result of an industry negotiation is irrelevant. As the Commission explained in the *CALLS Order*, "we must exercise our own independent judgment to ensure that any proposal we adopt in this area -- even a proposal that reflects a substantial degree of consensus among historically adverse parties -- is reasonable and in the public interest."[6] The Commission expressly concluded that the "constituent parts [of the CALLS Plan] individually

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[5] *In re Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6789, ¶ 380 (1990) ("*LEC Price Cap Order*") ("While we continue to collect other data from price cap LECs on a disaggregated basis, this collection is solely for monitoring purposes. This disaggregated data does not serve a ratemaking purpose for these carriers, nor is there any reason to expect that results under price caps will correspond to data from previous years. We have modified our Part 69 rules to reflect this expectation that our collection of disaggregated data from price cap LECs is for monitoring purposes only. We delegate to the Chief, Common Carrier Bureau the task of effecting these modifications to the ARMIS reporting requirements for price cap LECs.").

[6] Access *Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1 Report and Order in CC Docket No. 99-249 Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, ¶ 49 (2000) ("*CALLS Order*").

fall within the range of reasonableness." *CALLS Order* ¶ 49. In so doing, the Commission relied on the very cost accounting data that will be unavailable if the *Forbearance Order* stands.[7]

2. AT&T's Attempt To Justify The FCC's Conclusion That There Is No "Current Need" For Cost Assignment Data Is Unpersuasive.

AT&T argues that the FCC's distinction between the purported absence of a "current need" for the Cost Assignment rules and possible future uses for the rules is clear and reasonable. *AT&T Opp* at 3. In fact, the Commission's application of its "current need" standard, which is found nowhere in Section 10, is incoherent and arbitrary. For example, the very fact that the Commission has repeatedly concluded that AT&T has "exclusionary market power"[8] *requires,* pursuant to the mandates of Sections 201(b) and 202(a), that it continue to monitor AT&T's prices, unquestionably a current need at all times. Moreover, the FCC candidly concedes "that cost accounting data could be useful when the Commission *moves forward with*" special access, universal service, intercarrier compensation or "other reform." *Forbearance Order* ¶ 45 (emphasis added).[9] The Commission nevertheless concludes that this does not constitute a "current need." Does it mean that the information is relevant and "useful" but not "needed?" In all events, it is simply implausible for the Commission to conclude that cost

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[7] AT&T repeats over and over that the Cost Allocation rules produce data that are "inherently arbitrary" (*see AT&T Opp.* at 15) or are insufficiently accurate to assist with rate monitoring. But the FCC apparently disagrees, since it *never held* in the *Forbearance Order* that the data yielded by the accounting rules is insufficiently accurate to enable it to perform its monitoring function.

[8] *See Forbearance Order* ¶ 27, *citing Section 272(f)(1) Sunset of the BOC Separate Affiliate and related Requirements et al.,* Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 64 (2007) ("*272 Sunset Order*").

[9] The FCC's belief that it may need accounting data in its intercarrier compensation reform effort is a direct rebuke to AT&T's argument that the need for accounting data in "intercarrier compensation reforms is equally meritless." *AT&T Opp.* at 10.

assignment information is not "needed" in the special access reform docket where the Commission itself discusses it and seeks comment on that information in its own NPRM initiating the proceeding. *See Petition* at 10. Similarly, the very accuracy of the separations data itself is the subject of the pending separations reform proceeding, making it obviously a current need in that proceeding.[10]

3. The Opponents Fail To Rebut The Argument That The FCC Failed To Explain Its Departure From the *272 Sunset Order*.

AT&T incorrectly asserts that the FCC was not bound by its own finding in the *272 Sunset Order* that the accounting rules were necessary to protect against discrimination by carriers that retain market power over bottleneck inputs. *First*, as AT&T notes, in order to avoid justifying its departure from past precedent, the FCC asserted that the *272 Sunset Order* was merely a "rulemaking of general applicability" while a grant of forbearance was appropriate because the Section 10 standard is met with respect to AT&T. *See AT&T Opp.* at 11 (*citing Forbearance Order* ¶ 27). The implication of this conclusion is that the FCC believes that AT&T is not similarly situated to either Verizon or Qwest. But such an implication does not square with the reasoning of the *272 Sunset Order* or other passages in the *Forbearance Order*. For example, in response to AT&T's petition for forbearance from dominant carrier regulation for its in-region interexchange services, the FCC explicitly found that the safeguards relied upon in the *272 Sunset Order* should apply to AT&T and that disparate treatment for AT&T would be

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[10] AT&T states that the separations rules should be eliminated because the separations reform "rulemaking has been pending for many years, and there has been no indication from the Commission that new rules are forthcoming." *AT&T Opp.* at 10. But it is obviously absurd to rely on either the need to improve the accuracy of information (information that the Commission conceded was necessary in the *Forbearance Order* ¶¶ 24-25) or the Commission's own failure to complete its review of separations within AT&T's arbitrary time frame as the basis for entirely eliminating the separations rules.

"inconsistent with the statutory forbearance criteria."[11] In the *Forbearance Order* itself, the FCC believed that AT&T is similarly situated to other RBOCs, but then provided relief to AT&T alone.[12] Apparently the FCC believes that AT&T is not special in any relevant respect. Therefore the FCC's justification for its departure from the holding of the *272 Sunset Order* is meritless.

Second, AT&T argues that "D.C. Circuit case law makes clear that the Commission would have violated Section 10 if it has simply cited the *272 Sunset Order* as a ground for denying forbearance." *AT&T Opp.* at 12. This is irrelevant.[13] The FCC has an obligation to explain any departure from past precedent. The D.C. Circuit, in the very case cited by AT&T to buttress its assertion above, has held that this rule applies to Section 10 proceedings.[14] The FCC

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[11] *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-region, Interexchange Services,* Memorandum Opinion and Order, 22 FCC Rcd 16556, ¶ 7 (2007) ("*AT&T 272 Order*") ("To the extent that AT&T seeks relief from dominant carrier regulation different from, or in addition to, that granted in the *Section 272 Sunset Order*, we find that such additional relief would be inconsistent with the statutory forbearance criteria. As part of the new regulatory framework established in the *Section 272 Sunset Order*, AT&T will be subject to certain targeted safeguards as well as other continuing legal requirements.").

[12] *See Forbearance Order* ¶ 23 ("We realize that our decision here will result in a different accounting regime for AT&T than for the other BOCs. Although uniform regulatory treatment for similarly situated carriers is sometimes preferable, we do not think that is the case here with regard to the Cost Assignment Rules."). If Verizon and Qwest are granted the same relief as AT&T under the same rationale the FCC's entire justification for avoiding having to directly address the findings of the *272 Sunset Order* will collapse in on itself. *See Comment Sought On Request of Verizon and Qwest To Extent Forbearance Relief From Cost Assignment Rules,* Public Notice, WC Dkt. No. 07-21, DA 08-1361 (rel. June 6, 2008).

[13] The case cited by AT&T does not stand for the proposition that the FCC cannot cite an earlier rule or order to justify the dismissal of a later forbearance petition. Rather, in *AT&T Inc. v. FCC* the D.C. circuit found that the FCC cannot dismiss a forbearance petition based on a pending rulemaking. *See AT&T Inc. v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006).

[14] *See AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("It may be that it is reasonable for the Commission to demand a showing on market share in every dominance inquiry. But, no

failed to explain in the *Forbearance Order* the circumstances that would justify a departure from its conclusion in the *272 Sunset Order* that the accounting rules remain necessary.

Third, AT&T argues that the *272 Sunset Order* merely "noted" that the accounting rules still applied to AT&T and therefore the FCC need not explain its departure from the rationale of that order. *See AT&T Opp.* at n.10. As explained in the *Petition*, however, the FCC expressly relied on the continued application of the cost accounting rules in the *272 Sunset Order* as a means of constraining AT&T's abuse of its exclusionary market power. *See 272 Sunset Order* ¶ 90. In any event, the FCC did not reverse itself in the *272 Sunset Order*. It merely affirmed the importance of accounting regulation as a bulwark against anticompetitive conduct by AT&T. The FCC need not engage in a lengthy analysis to *reaffirm* the importance of an existing rule in a new order. In fact, the FCC has, on countless occasions, relied upon, without the need for extensive discussion, existing regulations or findings to protect against unjust or discriminatory behavior.[15] That is what the FCC did in the *272 Sunset Order*. On the other hand, any departure

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matter how reasonable it may be for the FCC to require market share data before evaluating an incumbent local exchange carrier's market power, it is not reasonable for the Commission to announce such a policy without providing a satisfactory explanation for embarking on this course when it has not followed such a policy in the past. The FCC cannot silently depart from previous policies or ignore precedent" as it has done here.") (internal cites omitted).

[15] For example, in the *TRRO*, the FCC determined that the availability of special access facilities did not justify the elimination of the right of carriers to obtain unbundled network elements. *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 ¶¶ 46-64 (2005) ("*TRRO*"). The FCC relied on and reaffirmed this determination in numerous later proceedings for the same purpose, none of which required extensive discussion. *See, e.g., Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas,* Memorandum Opinion and Order, 22 FCC Rcd 21293, ¶ 38 (2007) ("*6-MSA Order*").

from established precedent must be explained and justified.[16] The FCC's failure to do so is fatal in this case.

4. The Opponents' Other Arguments Should Be Rejected.

There is no basis to any of the Opponents' other arguments. For example, AT&T distorts arguments made by Sprint and even itself with respect to the use of accounting data. AT&T alleges that Sprint filed an *ex parte* in the special access docket arguing that, "the Commission could not justify rate reductions based on allocated ARMIS data on appeal and urg[ed] the Commission instead to rely on proposals that do not depend on the use of allocated accounting costs." *AT&T Opp.* at 7. In reality, Sprint merely stated that ARMIS data should not be used as a basis of reducing RBOC special access rates "[*i*]*f* price cap LECs can demonstrate that their filed ARMIS data materially misstate their special access costs and revenues."[17] Obviously, Sprint did not state that ARMIS data *do* materially misstate ILEC special access costs and revenues. AT&T also conveniently overlooks the fact that the FCC commenced the special access rate proceeding based on *AT&T*'s argument that high accounting rates of return demonstrates that RBOCs are exercising their market power.

AT&T's argument regarding the need for accounting data to determine exogenous cost *decreases* is equally unresponsive. *See AT&T Opp.* 9-10. *First*, simply because AT&T has not recently experienced any exogenous changes due to reallocated investments or the split between regulated and unregulated costs does not mean that it would not experience such changes in the

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[16] *See Watt v. Alaska,* 451 U.S. 259, 273 (1981) (holding that while agency decisions in line with past precedent are given substantial deference, a later conflicting decision is entitled to "considerably less deference.").

[17] *See* Sprint Nextel Corp. Written *Ex Parte* Presentation, WC Dkt. No. 05-25, at 43 Oct. 5, 2007) (attached to *ex parte* Letter from Gil M. Strobel, Counsel, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-25 *et al.* (filed Oct. 5, 2007)) (emphasis added)

future. Indeed, AT&T provides no indication as to why current conditions would preclude such a change. If such an exogenous adjustment were required under the rules, the FCC would have no mechanism to accurately lower price cap levels.

Second, as Petitioners explained, many other types of exogenous cost decreases may occur outside of separations changes. *See Petition* at 10. Without publicly available accounting data, it will be difficult, if not impossible, for third parties either to argue that an exogenous cost decrease is appropriate or determine if a cost decrease has been incorporated correctly into the price cap indices. The Opponents did not even attempt to address this problem.

AT&T's assertion that it should not publicly report the data from its compliance plan makes no sense, even on its own terms. *First*, AT&T asserts that such a requirement would be "burdensome." But it is difficult to see how publicly uploading information that AT&T already collects and is (likely) reporting to the FCC would create any additional burden. *Second*, AT&T argues that the purpose of forbearance was to "place AT&T at regulatory parity with its competitors, which are not required to report such information publicly." *AT&T Opp.* at n.13. The notion that forbearance from the rules were intended to promote parity is false on its face. By mandating that AT&T establish a compliance plan, the FCC has already determined that AT&T should bear a heavier burden than competitors. Treating AT&T differently is obviously sensible since AT&T possesses "exclusionary market power," and competitors do not. Also, as Petitioners argued previously, in the absence of publicly available data, it would be impossible for outside parties to determine whether to file a complaint or a rulemaking petition. None of the Opponents seeks to address this compelling justification for publicly available information.

Finally, AT&T argues that, even if the accounting data could theoretically be used by third parties to "uncover violations," the data is stale because it is "reported after a significant

time lag." *AT&T Opp.* at n.13 But year end 2007 ARMIS data were posted on the FCC's website in April. Data which are, at most, only four months old, can and should be used to detect unlawful conduct, and AT&T's argument to the contrary is absurd. Indeed, the FCC has required the RBOCs to report special access performance metrics on a quarterly basis, 45 days following the end of each quarter. *See 272 Sunset Order* n.285.

I. CONCLUSION

For the foregoing reasons, the petition for reconsideration should be granted.

Respectfully submitted,

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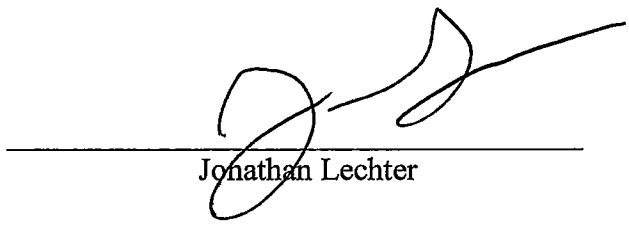

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